Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 75-134

MARY YOUNG CANNON,

Appellant

versus

WILLIAM J. GUSTE, JR., et al.,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

The Per Curiam Decision of the Three-Judge Court for the United States District Court for the Eastern District of Louisiana, which is not yet reported,

appears herein in Appendix B, page 62.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. This action was instituted by appellant in the District Court for the Eastern District of Louisiana under 28 USC Sections 1331 (Federal Question), 1337 (Commerce Clause), 1343 (Civil Rights), 2201-02 (Declaratory Judgments), 2281,2284 (Three-Judge Courts), and under 42 USC Sections 1981 and 1983 (Civil Rights), to enjoin the execution and enforcement of the Louisiana Compulsory Retirement provisions, as contained in Louisiana Revised Statutes, Title 42:691, 572 and Chapter VII, Section 8.2 of the Rules and Regulations of the Louisiana State Employees' Retirement System, and for a declaration of the unconstitutionality of such

provisions, on their face and as applied.

ii) Additionally, appellant had invoked the pendent jurisdiction of the trial court, requesting the court to find that the appellees had breached an agreement that appellant had made with her supervisor, extending her employment for one year, until October 3, 1975. See Appendix C, pages 73-75.

iii) Appellant, after her forced retirement, had filed an application for candidacy as a member of the Louisiana Civil Service Commission, but was no longer a classified state employee, as required of such candidates by the Louisiana Constitution of 1974. Her candidacy application had been denied and simultaneously to filing of her original complaint, she requested a

temporary restraining order permitting her to file the necessary candidacy papers. This request was summarily denied by a three-judge court, convened pursuant to 28 USC §2282, on January 10, 1975.

iv) The same three-judge court filed an opinion, on May 5, 1975, and rendered a judgment on May 9, 1975, upholding as constitutionally valid, the challenged statutes and provision. A notice of appeal to this Court from that judgment was filed on June 4, 1975.

v) The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 USC §1253.

vi) The validity of Louisiana Revised Statutes Title 42:691 and 42:572, and Chapter VII, Section 8.2 of the

Rules and Regulations of the Louisiana State Employees' Retirement System, are here involved. Due to the length of such provisions, they are set forth in Appendix A, infra, pages 53 to 61.

QUESTIONS PRESENTED BY THE APPEAL

The following questions are presented by this appeal:

1. Are state statutes and provision which require mandatory retirement from public employment, solely because a non-elected, non-appointive employee has reached the age of 65, without any hearing or individualized assessment of ability violative of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution?

2. Did the dismissal of the appellant after approval of a one year

extension of her employment by her former supervisor constitute a breach of contract by the appellee?

STATEMENT OF THE FACTS OF THE CASE

Appellant, who had been continuously and permanently employed in the Louisiana State Civil Service System for the past thirty-four (34) years and had been Supervisor of Collections in the Accounting Department of the Charity Hospital of Louisiana at New Orleans for the past five (5) years, was required to retire in November, 1974, solely because she had attained the age of 65. Since December 19, 1967, she has held and continues to hold the elective office of Chairman of the Louisiana State Retirement System.

Appellant's retirement was mandated by the provisions she challenges

herein, despite her extensive experience in various accounting positions, an excellent work record, and an excellent score on the Louisiana Civil Service Examination.

The appellant applied to her supervising authority, Dr. Isadore Brickman, for a one-year extension of her employment, in accordance with the challenged statutes and regulation. On October 3, 1974, Dr. Brickman approved the extension. Despite this agreement, Mrs. Cannon's employment was terminated in November, 1974.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

A. The Louisiana Statutes And Regulation Deny Appellant The Equal Protection Of The Law, As Guaranteed By The Fourteenth Amendment To The United States Constitution

The Louisiana mandatory retirement laws and regulation are repugnant to the Constitution's equal protection clause on three levels. First, they erect a class - i.e., 65 years or older, and then invidiously discriminate against members of that class by ousting them from their employment. Second, these laws and regulation bar adherence to any due process concepts in such ousters, while other Louisiana statutes clearly secure extensive due process protections to civil servants under age 65 who are removed from their jobs. Third, the challenged provisions automatically exempt from their application, elected officials and department heads appointed and commissioned by the Governor, thereby permitting dissimilar treatment for persons who are similarly situated.

Whatever constitutional tests are employed to measure the challenged statutes and regulation, those provisions must fall, for age may be no more a reasonable basis for discrimination than race, national origin or citizenship. As this Court indicated in 1897,

> "the state may not say that all white men shall be subject to the payment of attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall alone be subjected . . . . . " (Emphasis added). Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 155 (1897).

One commentator has noted that,

> "the exclusion of those over 65 as a class from protection against arbitrary age discrimination and employment reflects precisely what Judge J. Skelly Wright has called the 'arbitrary quality of thoughtlessness.' Hobson v. Hansen, 269 F. Supp. 491,497 (D.D.C. 1967), aff'd sub. nom. Schmuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969)." Note, Age Discrimination in

Employment, 47 So.Cal. Law Rev. 1311, at 1336, 1337 (1974).

1. Age Is A Suspect Classification Subject To Strict Scrutiny

This Court has repeatedly defined "inherently suspect classifications" as those whose members have "immutable characteristic[s] determined solely by the accident of birth." Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

Although the miracles of science have in many ways postponed and hidden the characteristics attributed to the aging process, the status of being and becoming older remains immutable from the moment of birth.

> "'It's the world's pity,' cried young Siddhartha, as he beheld a tottering,

> wrinkled, toothless, white-haired man, 'that weak and ignorant beings, drunk with the vanity of youth do not behold old age! . . . What is the use of pleasures and delights, since I myself am the future dwelling place of old age?'" S. de Beauvoir, The Coming of Age 1 (1972).

2. The Mandatory Retirement Statutes And Regulation Deprive Appellant of The Fundamental Right To Work

The jurisprudence emerging from this Court amply indicates that, absent any direct confrontation with the issue of a right to work, the prerogative of an opportunity for gainful employment is fundamental to the strength and stability of American society. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Truax v. Raich, 239 U.S. 33, 39-41 (1915); Smith v. Texas, 233 U.S. 630, 636 (1914). In fact,

> "the right to hold specific private employment free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." United States v. Robel, 389 U.S. 258, 270 (1967) (Brennan, J., concurring) Willner v. Committee on Character, 373 U.S. 96, 102 (1963); Greene v. McElroy, 360 U.S. 474, 507 (1959).

While ruling that the plaintiff in a comparable case had brought his suit prematurely, United States District Court Judge Marowitz stated:

> "[R]ecent Supreme Court cases, . . . coupled with the populace's hopefully enlightened views on gerontology, leave this court in grave doubt as to the constitutionality of the [mandatory retirement] statute herein challenged. . . . The right to work in these occupations is of as much importance to the elderly as to anyone else, for few things will age the aging more quickly then to deprive them of their usefulness to society." (Emphasis added). Rosen v. Carey, F. Supp. , No. 74

> C1006, (N. Ill., January 17, 1975).

Louisiana's mandatory retirement scheme runs contrary to this work ethic which is so deeply embedded in our national character.

3. The Louisiana Mandatory Retirement Statutes and Regulation Must Be Supported By A Compelling State Interest

Where a state's system "operates to the disadvantage of some suspect class or infringes upon a fundamental right explicitly or implicity protected by the Constitution," the challenged provisions must promote a compelling governmental interest. Frontiero v. Richardson, supra; San Antonio Independent School District v. Rodriquez, 411 U.S. 128 (1973); Weber v. Aetna Casualty & Surety Co., supra; Shapiro

v. Thompson, 394 U.S. 618 (1969).

These cases underscore this Court's determination to scrutinize closely statutory schemes which erect suspect classes or burden the exercise of fundamental rights.

> "[S]trict scrutiny means that the state's system is not entitled to the usual presumption of validity, that the state, rather than the complainant must carry a 'heavy burden of justification,' that the state must demonstrate that its . . . system has been structured with precision and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives." San Antonio Independent School District v. Rodriquez, supra, at 16, 17. See, Dunn v. Blumstein, 405 U.S. 330 (1972).

Louisiana fails to sustain this burden on all counts.

If the purpose of the statutes and regulation is to assure the employment

of competent workers, the provisions fail constitutionally, for, by erecting an arbitrary class of assumed incompetents, they ignore competency in fact, and crudely oust all persons of age 65, competent or not, while in no way addressing the issue of whether employees under age 65 are mentally and physically capable to perform their assigned duties.

When the Illinois Appellate Court in Fahey v. Cooke County Police Department Merit Board, 315 N.E.2d 573 (1974), was faced with issues similar to those in the instant case, it responded, as follows:

> "Where the question has arisen, courts have uniformly concluded that age alone isn't just cause for removal from protected merit employment.

> Age by itself tells nothing about these relevant matters [whether continued employment is detrimental to the discipline and efficiency of the civil service.] Its effects vary with the individual, and the importance of those effects varies with the nature of the individual's employment. Fahey [the plaintiff] himself was a supervisory investigator officer and an instructor in the department's academy. One would expect that age and experience enhanced rather than detracted from the competent performance of his duties.
>
> [Recognized merit principles of public employment] are few and relatively well known. Cardinal among them is that the purpose of civil service laws is to provide a method which insures competent service for governmental bodies . . . . To encourage their application and retention, qualified personnel are assured of tenure in their positions . . . Once he is qualified for a merit of appointment and passed through a probationary period a civil servant's tenure lasts during good behavior and efficient service. Compulsory retirement at a fixed age runs directly counter to these principles." Fahey v. Cooke County Police Department Merit Board, supra, at 577, 578.

The Louisiana Supreme Court reacted in the same manner to a civil service regulation in effect before the enactment of the statutes challenged in the instant case and stated thusly:

> "Is the age of 70 cause for removal? . . . [The] civil service amendment . . . prohibits the discharge of a classified employee except for 'cause', and . . . an employing authority [cannot] on the basis of age alone discharge an employer who admittedly could properly perform the duties of his position." Morrison v. Department of Highways, 229 La. 116, 85 So.2d 51 (1956).

No compelling interest justifies the forced retirement policy embodied in the challenged statutes and regulation. The very interest of securing able employees is disserved by arbitrarily dismissing people at age 65

since many capable employees are thereby ousted while younger incompetents are retained. The Louisiana courts themselves suggested that,

> "The purpose of the [Civil Service System] is to insure efficiency in governmental operation by providing security of employment, thus enabling the State to take advantage and reap the benefits of experience gained by those employees of long service." Vidrine v. State Parks and Recreation Commission, 169 So. 2d 641, 645 (La. App. 1965), appeal denied, 247 La. 348, 170 So.2d 857.

Further, L.S.A. - R.S. 42:691 and 42:572, and Section 8.2 of the Rules and Regulations of the Louisiana State Employees' Retirement System contain the evidence of their own irrationality by exempting elected and appointed public officials from their provisions. This implicit recognition that persons

over 65 are capable of handling highly important governmental positions belies any asserted justification for mandatory retirement. The fact that the statutes and regulation allow the Director of Charity Hospital to extend, on an individual basis, employment of persons over age 65, only serves to emphasize the State's disguised understanding that generalizations about individuals' abilities to work are not justified. The irony of this exemption is accentuated by the facts of the instant case, for while the plaintiff by virtue of her age is required to retire from her position as "Accountant #4", she is secure in her elected post as Chairman of the Louisiana State Employees' Retirement System.

The legislative exclusion of certain

similarly situated persons, i.e., those over 65, from coverage of the Louisiana mandatory retirement provisions is repugnant to the concept of equal protection. See, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Muhammad Ali v. State Athletic Comm'n, 316 F.Supp. 1246 (S.D.N.Y. 1970).

No compelling interest justifies the different treatment accorded different civil service employees. In fact,

> "a major intent and purpose of civil service is to insure uniformity among employees covered thereby, to the end that such employees in a particular class will enjoy equal and uniform rights with others in the same class." Sewerage and Water Board of New Orleans v. Barnett, 225 So.2d 381 (La. App. 1969).

Elected and appointed employees can work until they are either not elected, or removed from their appointment according to the terms of their appointments.

See, Nelson v. Miwa, Civil No. 3036, Haw. (1973), in which the Court recently held a university's age ceiling to be unconstitutional because it treated similarly situated employees differently and violated the plaintiff's rights to pursue employment.

> "University faculty and teachers have the right to pursue their occupations until they reach the age of 65 years, while all other employees of the state and county have the right to pursue their's until they reach the age of 70 years . . . . What . . . is the basis for this distinction? . . . The fear is expressed that reverting to the age ceiling of 70 years would make for a more static university faculty population, and that it would increase the number of its older professional personnel. This fear is more apparent then real, however, for several reasons. It presupposes that all [faculty members] who reach their 65th birthday each year are in the "deadwood' category, and that . . . is not necessarily so." Nelson v. Miwa, Civil No. 3036, Haw. (1973).

Finally, no compelling state interest justifies giving under-65 employees who are being removed, full due process rights under L.R.S. - R.S. 42:691, 42:572, and the Regulation, while denying all such rights to 65 year olds who are ousted from their jobs. Both groups include accountants. As to both, the issue is whether their duties can be ably performed. A fair hearing is no less relevant to determine the abilities of the members of one group than of the other.

This difference, then, in the allowance of due process rights and protections, necessarily leads to:

> "Predicting a finding of constitutional invalidity under the equal protection clause . . . on the observation that a state has accorded bedrock procedural rights to some, but not to all other similarly

> situated . . ." Stanley v. Illinois, 405 U.S. 645,658, n.10 (1972).

Louisiana's policy of granting employment extensions to persons over 65 illustrates that individualized determinations are undoubtedly feasible. A further indication of administrative flexibility is shown in other state programs, for example, the re-examinations required of licensed drivers in order to further highway safety. See L.R.S. - R.S. 3:408. Surely, fitness hearings for older civil servants can impose no greater burden upon governmental machinery than does administering driving tests to the general populace.

4. Even If The Compelling State Interest Test Is Rejected By This Court, Reed v. Reed Compels Ruling For The Appellant

In Reed v. Reed, 404 U.S. 71 (1971), this Court had before it a provision of the Idaho probate code which gave preference to men over women when persons of the same entitlement class applied for appointment as administrators of a decedent's estate. The Court stated:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons in similar circumstances shall be treated alike'." (citation omitted).

The Court thus posited an intermediate test -- "fair and substantial relation" -- between the compelling state interest standard and the rational relationship test.

Now, the Reed test has been employed in the most recent decision of

Murgia v. Commonwealth of Massachusetts, 376 F.Supp. 753, (D. Mass. 1974) (3-judge panel), pending in this Court. The three-judge court struck down a mandatory retirement law applying to the State Police (who, if anything, have more rigorous duties than accountants.) Examining this law is constitutional terms, the court concluded, at 3:

> "We hold that plaintiff has at least a recognizable interest in retaining his employment which the state cannot deny arbitrarily and irrationally, (citations omitted), and we find that mandatory retirement of officers at 50 years of age bears no 'fair and substantial relation to the object of the legislation,'" F.S. Royster Guano Co. v. Virginia, 1920, 253 U.S. 412, 415, quoted in Reed v. Reed, 1971, 404 U.S. 71, 76.

The court in Murgia examined the state's justifications for the retirement law and found them wanting. Here,

no justifications have even been offered; and if they were, they too would be wanting.

5. Even Under The Rational Relationship Test, Louisiana's Mandatory Retirement Laws Must Fall

Even should this Court reject all the foregoing tests, L.S.A. - R.S. 42:691 and 42:572, and Section 8.2 of the Rules and Regulations of the Louisiana State Employees' Retirement System still violate the constitutional guarantees secured to the appellant. As cited in Wieman v. Updegraff, 344 U.S. 173, 182 (1952), and its progeny, this Court makes it clear that public servants cannot be dealt with by a statute which is "patently arbitrary or discriminatory". At the least, there must be some "rational relationship to a

legitimate state purpose . . ." . Weber v. Aetna Casualty & Surety Co., supra.

On element of arbitrariness lies in the fact that Louisiana'a statutes sets age 65 as the critical chronological event. There is indeed no data which makes this age in some way special, save the traditions of the 20th century.[1/] And if persons can be barred from being

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1/ "There appears to be no particular reason for age 65 being a 'magic' age. This age "was legally sanctified in 1935 by the Social Security law. One fails to uncover any signified reason for his choice, except the fact that by then 65 had become common a cut-off point in business. Moreover, life expentancy was approaching 70, and a five-year retirement must have seemed logical." Withers, "Some Irrational Beliefs About Retirement in the United States", Industrial Gerontology 23, 24 (Winter, 1974). Today a 65 year old white male has a statistical life expectancy of 11 more years, with little to indicate that

(continued on next page)

accountants at age 65, so too can they be at 55, or 45, or 35. See, e.g., Truax v. Raich, supra. Yet, the truth is that age 65 is of no greater or lesser significance than any other arbitrarily selected age.

B. THE LOUISIANA STATUTES AND REGULATION DENY APPELLANT DUE PROCESS RIGHTS AS A PUBLIC EMPLOYEE, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Both the United States Supreme Court and the lower federal courts have

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1/ Continued
all or most of them need be unproductive. Ironically, the Framers of the Constitution viewed maturity as the objective to be sought, and thus framed those age restrictions in the Constitution (restrictions concerning when rights were to be given, unlike here, where rights are being taken away) with the aim of assuring voters over 21, Representatives over 25, Senators over 30, and Presidents over 35.

made it clear that public employees carry with them constitutional due process protections. Arnett v. Kennedy, 94 S.Ct. 1633 (1974); Schware v. The Board of Bar Examiners, 353 U.S. 232, 238-239 (1967).

But, the requirements of due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of life, liberty and property. "When protected interests are implicated, the right to some kind of prior hearing is paramount." Bell v. Burson, 402 U.S. 535, 542 (1971). Procedural due process rights attach where state action condemns a person to "suffer grievous loss of any kind." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); Goldberg v.

Kelley, 397 U.S. 254, 262-263 (1970); Morrissey v. Brewer, 408 U.S. 471 (1972).

As previously noted, liberty "denotes . . . the right of the individual to . . . engage in any of the common occupations of life." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). When the government dismisses a person from employment, such a dismissal may abridge liberty if it "forecloses a discharged employee's freedom to take advantage of other employment opportunities." McNeill v. Butz, 480 F.2d 314, 319 (4th Cir. 1973). In the instant case, automatic dismissal of the appellant of age 65 deprives her of the liberty to hold government employment, first, because she is above the arbitrary age limit set for Louisiana's non-

elected civil servants, and second, because she faces the same pervasive discrimination in employment faced by old persons throughout the job market, simply by virtue of her age.

Mrs. Cannon's dismissal also deprives her of a property right in her job secured both by her status as a permanent civil servant and by the contract agreement extending her employment one year until November 30, 1975. See, Appendix C. "A person's interest in a governmental benefit is a 'property' interest subject to procedural due process protection if[her] claim of entitlement to the benefit is supported by the rules of the agency affording the benefit or by mutually explicit understandings." Perry v. Sindermann, 408 U.S. 593, (1972); State Colleges v.

Roth, 408 U.S. 564, 577 (1972). Mrs. Cannon, by the terms of her employment embodied in the approved application for the extension of her employment, secured an interest in employment through 1975. This Court has consistently asserted that "the Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." Wieman v. Updegraff, 344 U.S. 183 (1953). For this reason, the Court has held that due process safeguards the interest of college professors and staff members dismissed during the terms of their contracts (Wieman, supra) and even the interests of those hired with a clearly implied promise of continued employment. See, Cornell v.

Higgenbotham, 403 U.S. 207, 208; and Collins v. Wolfson, 498 F.2d 1100,1104 (5th Cir. 1974).

Furthermore, ". . . continuous employment over a significant period of time can amount to the equivalent of tenure. When it does, dissolution of the relationship requires prior 'notice and an opportunity to be heard,' or else due process is wanting." Johnson v. Fraley, 470 F.2d 179 (4th Cir 1972). Mrs. Cannon has been continuously employed in the Louisiana State Civil Service System for the past thirty-four (34) years. To call her departure "retirement" is merely semantic gloss. In reality, she is out of a job and has lost several benefits, such as group health insurance coverage, income and increased retirement benefits, in

addition to the psychological impact that forced retirement has upon an individual.

The Supreme Court's recent ruling in a public employee dismissal case, Arnett v. Kennedy, 94 S.Ct. 1633 (1974) applies to the instant suit and compels judgment by this Court in favor of the appellant. For whatever alternative characterization is put on the appellees' actions pursuant to these challenged statutes and regulation, in reality, the appellant has been discharged.

Six members of the United States Supreme Court in Arnett agreed that a tenured employee could not be discharged without procedural due process protection.

In the instant case, a somewhat

more sophisticated, but equally objectionable, scheme has been erected to achieve the unconstitutional deprivation of the appellant's due process rights. The Louisiana Constitution, Article 14, Section 15 sets out the basis for a dismissal or removal of tenured civil servants, and further, sets out the procedural rights which accompany such dismissal or removal.

It is clear that within the terms of Arnett, supra, and the majority's reading thereof, that the treatment of the appellant violates her constitutionally guaranteed due process rights. For once the governmental body has acted to grant her permanent status it cannot, by regulation, withdraw from her the procedural rights which the United States Constitution and the Louisiana

Constitution secure to public employees facing dismissal.

C. THE LOUISIANA MANDATORY RETIREMENT STATUTES AND REGULATION EMBODY A CONSTITUTIONALLY OFFENSIVE IRREBUTTABLE PRESUMPTION OF INCOMPETENCY

In an increasing number of recent cases, the Supreme Court, generally under a due process rubric, has made a careful examination of the factual bases of legislative classifications that rested on irrebuttable or conclusive presumptions. See, Stanley v. Illinois, 405 U.S. 645 (1972) (irrebuttable presumption that unmarried fathers are incompetent to raise their children); Vlandis v. Kline, 412 U.S. 441 (1973) (irrebuttable presumption of non-residency for college tuition purposes); and LaFleur v. Cleveland Bd. of Education, 94 S.Ct. 791 (1974)(irrebuttable

presumption of incompetency of pregnant female teachers).

The similarities between the mandatory pregnancy leave rules in LaFleur and the mandatory retirement policies embodied in the Louisiana statutes and regulation which exclude workers who reach a fixed chronological age, are striking. The justifications offered in support of the two policies are essentially the same. In both situations, the employers assert that policies of mandatory severance at a fixed point are necessary to insure the efficient management of personnel and the continued employment of only physically fit workers. As this Court in LaFleur observed, efficient personnel management could be effected just as well if the individual was allowed to select his own time to

leave his job, so long as sufficient advance notice was given to the employer. Certainly, the Court's logic is not limited to educational institutions but applies with equal force to any established business or organization.

Age discrimination in employment also embodies an irrebuttable presumption of incompetence. And, as in the case of pregnant women, gerontological experts differ on many points, but unanimously agree on one - the ability of any worker to do his job past any given age is completely an individual matter; chronological age is a grossly inadequate index of a worker's ability.

In view of the fact that the Louisiana mandatory retirement statutes and regulation conclusively presume that

employees upon reaching their 65th birthday are no longer able, competent, or efficient, and because the organizational efficiency sought by these rules can be obtained without resorting to irrebuttable presumptions, such laws which sanction arbitrary age discrimination against persons 65 years or older should be struck down as constitutionally impermissible.

1. The Individualized Assessment Which LaFleur Mandates Is Very Much Feasible

This Court might find some presumptions to be sustainable because there are no alternatives. What situations might invoke this state of affairs are unknown to the appellant. However, whether or not such situations exist is not relevant here, because individualized assessment of civil servants 65 and

over is very much feasible.

Individualized assessment of government employees is already very much a part of the Louisiana Civil Service System. The Louisiana Constitution of 1974 now provides for dismissal of employees only for cause. Article 14, Section 15, of the Louisiana Constitution of 1921, which was enforced when the appellant was terminated, vests the Civil Service Commission with the authority to set out the procedures to be employed in determining qualifications of employees. Additionally, this section empowers the commission to establish work-test periods before appointees acquire permanent status as classified employees.

Thus, the Louisiana Civil Service System already contemplates and

implements a system of individualized assessments of employees' abilities.

Appellees' failure to employ this alternative simply is insufficient to sustain what is, in light of LaFleur, supra, and Murgia, supra, an unconstitutional irrebuttable presumption at age 65. Nor can administrative convenience of the defendants save this policy. As stated by this Court in LaFleur:

"[A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." 94 S.Ct. at 799.

D. THE APPELLANT'S TERMINATION AFTER APPROVAL OF HER REQUEST FOR A ONE YEAR EXTENSION OF EMPLOYMENT CONSTITUTES A BREACH OF CONTRACT

Invoking the pendent jurisdiction of this Court, appellant submits that her termination from employment at

Charity Hospital after the approval of her request for a one year extension by her supervising authority, Dr. Isadore D. Brickman, (See, Appendix C), constitutes a breach of contract under Louisiana law. The pertinent provisions of Louisiana contract law are found in the Louisiana Civil Code in Articles 1761, 1768, 1803, 1811 and 1816 which provide as follows:

> Art. 1761. A contract is an agreement, by which one person obligates himself to another, to give, to do or permit, or not to do something, expressed or implied by such agreement.
>
> Art. 1768. Commutative contracts are those in which what is done, given or promised by one party, is considered as equivalent to, or a consideration for what is done, given, or promised by the other.
>
> Art. 1803. But when one party proposes, and the other assents, then the obligation is complete, and by virtue of the right each

> has impliedly given to the other, either of them may call for the aid of the law to enforce it.
>
> Art. 1811. The proposition as well as the assent to a contract may be expressed or implied:
>
> Express when evidenced by words, either written or spoken;
>
> Implied, when it is manifested by actions, even by silence or by inaction, in cases in which they can from circumstances be supposed to mean, or by legal presumption are directed to be considered as evidence of an assent.
>
> Art. 1816. Actions without words, either written or spoken, are presumptive evidence of a contract, when they are done under circumstances that naturally imply a consent to such contract. To receive goods from a merchant without any express promise, and to use them, implies a contract to pay the value. If an offer is made of an article in deposit, and the article is received, the contract of deposit is complete. If a mandate is acted on, the mandatory is bound in the same manner as if he had accepted in writing. In all those cases and others of the like nature, all the conditions, which he, who gives or proposes, annexed to the delivery

> or the acceptance of the proposition, are also presumed to have been accepted by the act of receiving. If the merchant, in delivering the goods, declare that they must be paid for by a certain time; if the depositor designate how the deposit is to be kept, or the mandator in what manner his commission is to be executed, he who receives and acts is obligated to the performance of all these conditions.

The above-cited provisions clearly establish a contractual agreement between Charity Hospital and the appellant, Mrs. Mary Young Cannon. The procedures for obtaining a one year extension in her employment contract were completed by Mary Cannon. Her request was approved by her supervising authority, Dr. Isadore D. Brickman. Thus, a valid and legally enforceable contract was made between the appellant and her employer Charity Hospital.

To permit a successor to negate previously entered into contracts is illegal and contrary to law and would have a totally devastating effect on contractual obligations entered into by the state and third parties. Certainly, appellant knows of no law or precedent which permits an agency head, public official, or administration to disregard prior enforceable contracts. Neither should the instant case be an exception to this long standing rule.

C O N C L U S I O N

In conclusion, appellant argues that the time has come for this Court to seriously evaluate the mandatory retirement policies established by L.S.A. - R.S. 42:691, 42:572, and Chapter VIII, Section 8.2 of the Rules and Regulations of the Louisiana State

Employees' Retirement System; it is time to decide whether it is morally right, socially profitable, economically wise and above all, constitutionally sound to permit declarations by legislative fiat, that the useful life of the appellant and other career civil servants has been completed solely because they have reached an arbitrarily designated age.

The relegation of the elderly to a single role should not be permitted. They are individuals with different values, capacities, personalities and life styles. A person's worth should be measured by his individual capacity, unique to any human being, rather than the number of years he happens to be on earth.

The valuable services which several members of the federal judiciary have provided despite their age should also be pointed out. Mr. Justice Brandeis (1856 to 1941) retired when he was 83, to devote his remaining years to the Zionist movement. Mr. Justice Holmes (1841 to 1935) was 60 years of age when President Theodore Roosevelt appointed him and 91 when he retired. Mr. Justice Black (1886 to 1971) served until he was 85 and Mr. Justice Harlan (1899 to 1971) served until he died at age 72. Each of these Justices demonstrated a sharp and penetrating mind throughout their careers. See, Anderson, Age Discrimination: Mandatory Retirement From the Bench, 20 Loy.Law Rev. 153, at 155, 156 (1974).

As an institution, work holds a particularly important place in American society. In a socio-physiological sense, work yields more than instrumental rewards; it becomes a form of social identification, a demonstration of vitality, an escape from boredom, and an intrinsic enjoyment. Given this central importance of work for all people, integration of the older worker into the existing employment structure is imperative.

Furthermore, age discrimination is costly to everyone in this society. One study estimated that a system which ended age discrimination in employment could result in a $10 billion boost in the gross national product, as compared with the present system which has in 1964 alone cost the taxpayer $1 billion

in unemployment insurance benefits. See, Note, Age Discrimination In Employment: The Problem of the Worker Over Sixty-Five, Vol. 5 Rutgers-Camden Law Journal 484, fn. 86 (1974).

We must continue to ask ourselves whether this abrupt retirement without dignity, hearing, or regard to the respective individual's health and mental condition is the proper method of approach in our civilized society. The nation should take advantage of all the skill, wisdom, moral judgment, experience and sense of good values that are available. The world must awaken to the good qualities of all its citizens, not as burdens, but as resources to be utilized and encouraged. Useful today, useless tomorrow is a theme that should haunt us all. Justice Holmes, when once

asked why he continued his labors on the bench at his advanced age, answered: "To live is to function."

Also, appellant urges that her termination pursuant to the Louisiana mandatory retirement statutes and regulation be declared a breach of contract, and that this Court reinstate her with all wages and retirement benefits which have been lost since the date of her termination.

For the foregoing reasons, appellant respectfully urges that the Louisiana mandatory retirement statutes and regulation be declared unconstitutional in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and the Due Process

Clause of the Fifth Amendment to the United States Constitution.

RESPECTFULLY SUBMITTED:

WILLIAM E. RITTENBERG

DALE C. WILKS

RITTENBERG & WILKS
Attorneys At Law
2-3-4 Loyola Avenue, Suite 819
New Orleans, Louisiana 70112
(504) 523-2939

CERTIFICATE OF SERVICE

I certify that a copy of the Jurisdictional Statement of the Appellant has on this _____day of July, 1975, been mailed, postage prepaid, to Mr. William E. Curry, Assistant Attorney General for the State of Louisiana, 7th Floor, 2-3-4 Loyola Avenue, New Orleans, Louisiana 70112.

DALE C. WILKS
Counsel for Appellant

APPENDIX A

R.S. 42:691

RETIREMENT

PART VIII. SPECIAL PROVISIONS FOR COMPULSORY RETIREMENT

§ 691. Compulsory retirement at age sixty-five; exceptions; earlier mandatory retirement ages not extended; teachers and college presidents

A. Effective January 1, 1959, any employee of the state of Louisiana, or any political subdivision thereof, except elected officials and department heads appointed and commissioned by the governor, who is insured under the Federal Social Security Law, or who is a member of any public employees' retirement system, and for whom the state or any political subdivision thereof has made or is liable for contributions toward his retirement, who shall have attained the age of sixty-five years shall be separated from the public service by his appointing authority if such employee is eligible for retirement under either the Social Security Act or the retirement system of which he is a member. If such employee is not eligible for retirement under either the Federal Social Security Act or the retirement system of which he is a member separation shall occur whenever he shall become eligible for

retirement under either system or upon attainment of age seventy, whichever event shall first occur. In any case in which the appointing authority certifies that the continuance in service of the employee who shall have attained the age of sixty-five or over would be advantageous to the public service by reason of his expert knowledge and qualifications, such employee may be continued in the public service by his appointing authority beyond the age of sixty-five for periods of one year.

B. Nothing contained in this Section shall be construed as granting any extension to any member of a retirement system which has a provision requiring an earlier mandatory retirement age; and provided further that nothing herein contained shall be construed to in any manner affect the mandatory retirement age for teachers or college presidents. Acts 1958, No. 54, §§ 1,2.

HISTORY AND SOURCE OF LAW

Title of Act:

An Act to require that all employees of the State of Louisiana or any political subdivision thereof, except elected officials and department heads appointed and commissioned by the Governor, shall be compelled to retire at age sixty-five is eligible for retirement either under any public employees retirement act or the Federal Social Security Act; to provide for the separation of such employees at age seventy

whether eligible for retirement or not; provided in any case an employee may be continued in service on a year to year basis by his employer, regardless of his age and regardless of his eligibility or ineligibil-

* * * * * * *

PART IV. RETIREMENT AND RETIREMENT BENEFITS

SUB-PART A. REGULAR RETIREMENT

§ 571. Eligibility for retirement

A. Any member shall be eligible for retirement if he has:

(1) Thirty years or more of service, at any age.

(2) Twenty-five years or more of service, at age fifty-five or thereafter.

(3) Ten years or more of service, at age sixty or thereafter, if he earns retirement eligibility while in state service.

(4) Fifteen years or more of service, at age sixty or thereafter, if he leaves state service prior to age sixty.

B. For purposes of acquiring eligibility for regular retirement, disability retirement and survivor's benefits only, a part-time employee shall count every year in which he works on a part-time basis for at least eleven months as a full year of retirement credit but for eligibility only.

C. Retirement eligibility shall not be cancelled after it is earned except by refund requested by the member. Amended by Acts 1971, No. 165, § 1; Acts 1972, No. 135, § 1, eff. July 26, 1972.

Sections 3,5, and 6 of Acts 1972, No. 135 provide as follows:

"The provisions of this Act shall take effect on July 26, 1972, except where otherwise specifically provided, and no provision of this Act shall be retroactive.

"All laws or parts of laws in conflict herewith are hereby repealed; provided, however, that nothing contained herein shall be construed as repealing, modifying or affecting the provisions of Sections 36, 36.1 and 37 of Title 24 of the Revised Statutes of 1950, as amended.

"Notwithstanding any other provisions of law to the contrary, any member of the system who was employed as a counsel by the Louisiana Wildlife and Fisheries Commission between the years 1960 and 1965 for which credit has not been received shall be entitled to receive credit for all service so rendered from 1960 to 1965 both dates inclusive.

"In order to obtain such credit, the member shall not later than December 31, 1972, make application therefor to the board of trustees of the system and shall furnish a detailed verified statement of all service for which credit is claimed. Employer and employee contributions for the period in which credit is sought will be made in accordance with the provisions in R.S. 42:571 in effect at the commencement of the 1972 regular session of the legislature."

1. Construction and application

State purchasing director who was

required by the mandatory provisions of the state retirement law to retire from state service but who, on the day following his retirement, was hired by another state agency, the Department of Education, as an unclassified employee, purportedly on a part-time basis, and who thereafter drew both the salary from his employment as well as his retirement benefits was not, under the provisions of the Louisiana State Employees Retirement System, entitled to receive benefits without withdrawing from state service. Martin v. Louisiana State Emp. Retirement System, App. 1972, 262 So.2d 75, affirmed 280 So.2d 910.

Where plaintiff's employment by Department of Education was in contravention of the state retirement statute and he was not entitled to its benefits while so employed, neither was he liable for any obligation imposed on him thereunder. Id.

If a state employee is required to be retired, he is not entitled to both retirement benefits and a salary if he returns to state employment contrary to the compulsory retirement provisions of the Louisiana State Employees Retirement System. Id.

§ 572. Compulsory retirement at age sixty-five; exemptions

Any member, except elected officials and department heads appointed and commissioned by the governor, shall be retired upon attaining age sixty-five if

the member is eligible for regular retirement. If the member is not eligible for regular retirement upon attaining age sixty-five, he shall be retired upon attaining regular retirement eligibility. However, the appointing authority may extend the member's employment for periods of one year by certifying that his superior skills and knowledge make his continued employment advantageous to the state.

Added by Acts 1968, No. 292, § 1. Amended by Acts 1970, No. 175, § 1, emerg.eff. June 30, 1970, at 5:00 P.M.; Acts 1972, No. 135, § 1 eff. July 26, 1972.

Former LSA-R.S. 42:585, on the same subject, as amended by Acts 1950, No. 14, § 1 and Acts 1952, No. 108, § 1, was repealed by Acts 1966, No. 492, § 9.

1. Construction and application

Where, after state employee had retired and had begun receiving retirement benefits, he was again hired by another department of state government, employee had no vested right to application of provisions for former version of rule which would have permitted him to continue to receive retirement benefits despite part-time state employment, and plaintiff was properly denied reinstatement to full retirement and

* * * * * *

REGULAR RETIREMENT

A. ELIGIBILITY

8.1 Any member shall be eligible for retirement provided he has:

(1) Thirty years of service or more at any age.

(2) Twenty-five years of service or more at age fifty-five or thereafter.

(3) Ten years of service or more at age sixty or thereafter, if he earns retirement eligibility while in state service.

(4) Fifteen years of service or more at age sixty or thereafter if he leaves state service prior to age sixty.

B. MANDATORY

8.2 Any member, except elected officials and department heads appointed and commissioned by the Governor, shall be retired upon attaining age sixty-five provided said member is eligible for regular retirement. If said member is not eligible for regular retirement upon attaining age sixty-five, he shall be retired upon attaining

regular retirement eligibility. The appointing authority may extend the member's employment for periods of one year by certifying that his superior skills and knowledge make his continued employment advantageous to the State.

C. APPLICATION

8.3 An application shall be considered officially filed with the Board when received in the office of the Director. (See Form ER-4 on Page 90)

8.4 Retirement benefits become effective the date the application for retirement is filed in the office of the Director or the day after the member terminates from the state service, whichever is the latter.

8.5 Any member may cancel his application for retirement prior to the effective date of said retirement. However, a member cannot cancel his application for retirement upon or after the retirement effective date.

D. BENEFIT

8.6 A member shall receive a maximum retirement benefit equal to 2% of average compensation for every year of creditable service plus $300.00 per year.

APPENDIX B

U. S. DISTRICT COURT
Eastern District of Louisiana
Filed May 5 1975
Nelson B. Jones
Clerk Received May 6 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY YOUNG CANNON — SECTION "A"

VS. — No. 74-3211

WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana; — CIVIL ACTION

HON. EDWIN W. EDWARDS, Gernor of the State of Louisiana;

ROY B. SCHAEFER, JR., Director of the Louisiana State Employees Retirement System;

HAROLD E. FORBES, Director of the Louisiana Department of State Civil Service;

DR. WILLIAM H. STEWART, Commissioner of Louisiana Health and Human Resources Administration;

W. K. SWEENEY, Deputy Commissioner of Louisiana Health and Human Resources Administration;

RENE LEE FRAZIER, Director of the Charity Hospital of Louisiana at New Orleans;

WELDON TALLEY, Comptroller of the Charity Hospital of Louisiana at New Orleans;

MRS. EVELYN BRANYON, Assistant Administrator of Fiscal Management at the Charity Hospital of Louisiana at New Orleans;

and

WILLIAM WEST, Chief Accountant at the Charity Hospital of Louisiana at New Orleans

(THREE-JUDGE CASE)

Before AINSWORTH, Circuit Judge, HEEBE, Chief District Judge, and CHRISTENBERRY, District Judge

PER CURIAM:

This matter was argued on a former day before this three-judge panel, and

the court has taken time to consider the arguments and memoranda of counsel.

Plaintiff brought this suit requesting declaratory and injunctive relief from the enforcement of the Louisiana compulsory retirement statutes as contained in Louisiana Revised Statutes Title 42:691 and 42:572 and Chapter VIII, Section 8.2 of the Rules and Regulations of the Louisiana State Employees' Retirement System. Mary Young Cannon, plaintiff herein, was a Louisiana State Civil Service employee who attained the age of 65 years on November 27, 1974. Louisiana law requires that an employee eligible to retire under either the Federal Social Security Law or any Public Employees' Retirement System who attains the age of 65 years must retire, unless the employee's appointing authority certifies that it is to the agency's advantage to retain such employee for one year. Plaintiff was eligible to retire as a member of the Louisiana State Employees' Retirement System; the administrative director and deputy commissioner did not so certify her for retention of one year, although her immediate supervisor did approve such an extension, hence she was forced into retirement.

After her retirement plaintiff filed an application for candidacy as a member of the Louisiana Civil Service Commission. Under Louisiana'a new Constitution (effective January 1,1975), such a member must be classified as an

employee of the State, which plaintiff Cannon was not, on January 3, 1975, when the call for the election was made. As a result, her candidacy application was denied.

Plaintiff alleges federal question jurisdiction on the grounds that the compulsory retirement statutes, based on age 65 years, are violative of her due process and her equal protection rights under the Fifth and Fourteenth Amendments of the United States Constitution. The relief requested is twofold: to be reinstated to her accountant's position at Charity Hospital of Louisiana at New Orleans, and to be permitted to file the necessary candidacy papers to qualify as a candidate for the position of member of the Louisiana State Civil Service Commission.

The plaintiff raises the following issues in support of her position: (1) Louisiana'a mandatory retirement requirements create an arbitrary classification which is not reasonably related to a legitimate governmental objective; (2) age is a suspect classification which requires a showing of compelling state interest; (3) the automatic exemption of elected officials and department heads appointed and commissioned by the Governor permits dissimilar treatment of persons similarly situated; (4) the mandatory retirement statutes and regulations create an irrebuttable presumption of

incompetency which deprives plaintiff of a property right and a liberty interest inherent in the foreclosure of future employment opportunities; (5) dismissal of plaintiff after approval of a one-year extension of employment by her former supervisor deprived her of a property right and interest in her job and constituted a breach of contract by defendants.

Plaintiff has been unsuccessful in her endeavors to offer persuasive judicial authorities in support of the complaint. This court is satisfied that there is a rational basis for maintaining the mandatory retirement requirement at age sixty-five in that it is fairly and substantially related to the state's valid economic objective of maintaining an efficient, vigorous and healthy civil service, and of establishing a feasible system for promotions of younger employees. See Armstrong v. Howell, 371 F. Supp. 48 (D. Neb. 1974), a factually similar case. The contention that age is a suspect classification demanding proof of a compelling state interest is infirm and unsupported jurisprudentially. Weiss v. Walsh, 324 F. Supp. 75 (S.D. N.Y. 1971), aff'd, 461 F.2d 846 (2d Cir. 1972), cert. denied, 409 U.S.1129 (1973). Plaintiff's claim of dissimilar treatment is unfounded in that those persons exempted from mandatory retirement are not in the classified civil service and are not "similarly situated."

Plaintiff has not established that she possessed a constitutionally protectible property interest in her employment prior to dismissal: a mere unilateral, subjective expectation that her request for continued employment of one year would receive the requisite final approval (see Plaintiff's Exhibit No. 10) is insufficient. See Perry v. Sindermann, 408 U.S. 593, 603 (1972). As stated by the Supreme Court in Board of Regents v. Roth, 408 U.S. 564, 577 (1972) and recently reemphasized by the Fifth Circuit in Roane v. Callisburg Independent School District, No. 74-1055 (5th Cir., Apr. 18, 1975) at 5091:

> "To merit due process protections, a person must have more than an 'abstract desire' or even a compelling personal need for the interest in question; he must be able to establish a 'legitimate claim of entitlement to it.'"

As the Roth court expressly stated, "property interests . . . are not created by the Constitution," but rather "they are created. . . and defined by existing rules or understandings that stem from an independent source such as state law. . . ." Board of Regents of State Colleges v. Roth, supra. A review of the record reveals nothing in plaintiff's employment relationship with the State that would justify or give rise to an objective and bilateral expectation of continued employment.

For the foregoing reasons it is ordered that the action of Mary Young Cannon be and the same is hereby DISMISSED.

New Orleans, Louisiana, this 5th day of May, 1975.

s/Robert A. Ainsworth Jr
ROBERT A. AINSWORTH, JR.
United States Circuit Judge

s/Frederick J. R. Heebe
FREDERICK J. R. HEEBE
Chief, United States District Judge

s/Herbert W. Christenberry
HERBERT W. CHRISTENBERRY
United States District Judge

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF LA
May 8, 1975
Nelson B. Jones
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY YOUNG CANNON	SECTION "A"
VS.	No. 74-3211
WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana, et. al.	CIVIL ACTION

J U D G M E N T

For the written reasons on file herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, William J. Guste, Jr., Attorney General of the State of Louisiana; Hon. Edwin W. Edwards, Governor of the State of Louisiana; Roy B. Schaefer, Jr., Director of the Louisiana State Employees Retirement System; Harold E. Forbes, Director of the Louisiana Department of State Civil Service; Dr. William H. Stewart, Commissioner of Louisiana Health and Human Resources Administration; W. K. Sweeney, Deputy Commissioner of Louisiana Health and Human Resources Administration; Rene

Lee Frazier, Director of the Charity Hospital of Louisiana at New Orleans; Mrs. Evelyn Branyon, Assistant Administrator of Fiscal Management at the Charity Hospital of Louisiana at New Orleans; Weldon Talley, Comptroller of the Charity Hospital of Louisiana at New Orleans, and William West, Chief Accountant at the Charity Hospital of Louisiana at New Orleans, and against plaintiff, Mary Young Cannon, dismissing her suit at her cost.

Dated at New Orleans, Louisiana, this 8th day of May, 1975.

s/Robert A. Ainsworth Jr.
ROBERT A. AINSWORTH, JR.
United States Circuit Judge

s/Frederick J. R. Heebe
FREDERICK J. R. HEEBE
Chief, United States District Judge

s/Herbert W. Christenberry
HERBERT W. CHRISTENBERRY
United States District Judge

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF LA
Jun 4, 1975
Nelson B. Jones
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY YOUNG CANNON, Plaintiff	*	CIVIL ACTION
	*	No. 74-3211
versus	*	Section "A"
WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana, et al. Defendant	*	THREE-JUDGE COURT

****

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Mary Young Cannon, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment dismissing her complaint, entered in this action on May 8, 1975.

This appeal is taken pursuant to 28 U.S.C. §1253.

s/William E. Rittenberg
WILLIAM E. RITTENBERG

s/Dale C. Wilks
DALE C. WILKS

ATTORNEYS FOR MARY YOUNG CANNON

RITTENBERG & WILKS
Attorneys At Law
Suite 819
New Orleans, Louisiana 70112
(504) 523-2939

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 4th day of June, 1975.

s/Dale C. Wilks

APPENDIX C

PLAINTIFF'S EXHIBIT

CHARITY HOSPITAL OF LOUISIANA
AT NEW ORLEANS

Don't Say It-Write It

HOSPITAL TELEGRAM

Date October 3, 1974

TO Mr. Weldon Talley Comptroller

FROM Mary Young Cannon Collection
Supr.

This is to request that I have an extension of one (1) year in my employment based on the fact that I have an excellent record of employment. I have always been in attendance on the job and have over the period of years acquired the knowledge of knowing practically each function of the Accounting department.

As an elected member of the Retirement Board I can also be of valuable help to the employees and the Charity Hospital itself.

My record will bear out the fact that I am well versed in each function of the Accounting department.

s/ IDB

A F F I D A V I T

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

DR. ISADORE D. BRICKMAN

who after being first duly sworn did depose and say:

1) That I know the plaintiff, Mary Young Cannon, and am familiar with the matter entitled, Mary Young Cannon v. Williams J. Guste, Jr., et al., Civil Action No. 74-3211, Section "A", on the docket of the United States District Court for the Eastern District of Louisiana;

2) That I held the position of Director of Charity Hospital of Louisiana at New Orleans, and was the supervising authority authorized to approve one year extensions of employees' contracts pursuant to L.S.A. - R.S. 42:691, R.S. 42:572 and Section 8.2 of the Rules and Regulations of the Louisiana State Employees' Retirement System;

3) That on or about October 3, 1974, I received a Hospital Telegram from Mrs. Mary Young Cannon requesting a one year extension of employment beyond her 65th birthday;

4) That I knew the plaintiff and was familiar with her work record and her performance in the Accounting Department of Charity Hospital, and considered her skills superior and an asset to the Accounting Department;

5) That because of her superior skill and knowledge, and that her continued employment would be advantageous to Charity Hospital as well as the State, I approved her request to continue her employment in the Accounting Department of Charity Hospital for a period of one year, and so indicated by initialing her Hospital Telegram request.

6) That I have given this affidavit of my own free will and that the statements contained herein are true to the best of my knowledge and belief.

s/Isadore D. Brickmen
DR. ISADORE D. BRICKMAN

SWORN TO and SUBSCRIBED
BEFORE ME this 12th day
of February, 1975.

s/William E. Rittenberg
NOTARY PUBLIC

Supreme Court, U. S.
FILED
OCT 14 1975
MICHAEL RODAK, JR., CLERK

75-134

In the Supreme Court of the United States

OCTOBER TERM, 1975

MARY YOUNG CANNON

versus

WILLIAM J. GUSTE, JR., et al.

On Appeal From the United States District Court For the Eastern District of Louisiana

---

Motion to Affirm

WILLIAM J. GUSTE, JR.
Attorney General

WARREN E. MOULEDOUX
First Assistant Attorney General

KENDALL L. VICK
Assistant Attorney General

WILLIAM P. CURRY, JR.
Assistant Attorney General

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ATTORNEYS FOR APPELLEES

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-134

MARY YOUNG CANNON

versus

WILLIAM J. GUSTE, JR., et al

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

Pursuant to Rule 16(1) (c) of the rules of this Court, the appellees herein move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a Three-Judge District Court dismissing the action brought by plaintiff seeking declaratory and injunctive

relief from the compulsory retirement requirement for Louisiana State employees statutes as contained in Louisiana Revised Statutes Title 42:691 and 42:572 and Chapter VIII, Sections 8.2 of the Rules and Regulations of the Louisiana State Employees' Retirement System.

Appellant, Mary Young Cannon, was a Louisiana State Civil Service employee who attained the age of 65 years during the month of November, 1974. She was eligible to retire as a member of the Louisiana State Employees' Retirement System. Under Louisiana law, an employee eligible to retire under either the Federal Social Security Law or any Public Employees' Retirement System who attains the age of 65 years, must retire, unless the employee's appointing authority certifies that it is to

the agency's advantage to retain such employee for one year. Ms. Cannon's appointing authority did not certify that she possessed such expert knowledge and qualifications that required her retention.

After having retired on November 31, 1974, Ms. Cannon filed an application for candidacy as a member of the Louisiana Civil Service Commission. The position, which became available under the terms of Louisiana's new Constitution effective midnight, December 31, 1974, requires that the Commission member be elected from the classified employees of the State. La. Const. of 1974, Art. X, Sec. 3(c). Since she was not a classified employee on January 3, 1975, when the call for the election was made, Ms. Cannon was denied candidacy in

the election.

The complaint alleged that:

1. She was denied procedural due process in being separated without being given a hearing.

2. The retirement statutes, based on an age of 65 years, are unconstitutional as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The three-judge court, in a per curiam opinion, held that there was a rational basis for maintaining the mandatory retirement requirement at age 65 and, hence, there was no violation of the clause. In addition, the district Court found no jurisprudential precedent requiring the state to show a compelling interest because age has not been declared a suspect classification. With

reference to the due process contention, the lower court also found no protected property interest established by the appellant in her employment prior to dismissal. There was no "objective and bilateral expectation of continue employment..." See Appendix B at page 67 of appellant's Jurisdictional Statement.

ARGUMENT

Appellant's contentions were thoroughly considered by the three-judge district Court and the judges unanimously agreed that her constitutional rights had not been violated. The decision is correct and should be affirmed.

Appellant contends in Section A-1 of her Jurisdictional Statement that age is a suspect classification subject to strict scrutiny. Appellees contend that

age has not been found to be "suspect" in the jurisprudence and, therefore, the "compelling interest" test need not be applied. The Court below agreed, citing Weiss v. Walsh, 324 F. Supp. 75, 77 (S.D.N.Y., 1971) aff'd.,461 F. 2d 846 (2d Cir. 1972), cert. denied, 409 U.S. 1129 (1973):

> ... Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to disminished capacity or longevity is still future. It cannot be said, therefore, that age ceilings upon eligibility for employment are inherently suspect, although their application will inevitably fall injustly in the individual case. If the precision of the law is impugnable by the structure of general applicability, vindication of the exceptional individual may have to attend the wise discretion of the administrator....

The Weiss Court also noted that "(e)ven where the Equal Protection

Clause is buttressed by the Sixth Amendment's cross-sectional principle respecting jury selection, the Constitution tolerates some variation in eligibility at the ends of the age spectrum." 324 F. Supp. at 77.

Further, the State contends that Ms. Cannon may not attack the constitutionality of a statute from which she has derived benefits. The statutes creating the Civil Service and its Retirement System enabled Ms. Cannon to be employed by Charity Hospital and, also, made her position secure. These same laws provide for the mandatory retirement appellant desires to avoid.

This Court stated through Mr.Justice Rehnquist in Arnett v. Kennedy, 416 U.S. 134, 152-153 (1974):

The Court has previously viewed

skeptically the action of a litigant in challenging the constitutionality of portions of a statute under which it has simultaneously claimed benefits. In Fahey v. Mallonee, 332 U.S. 245 (1947), it was observed:

...

> It is an elementary rule of constitutional law that one may not 'retain the benefits of an Act while attacking the constitutionality of one of its important conditions.' United States v. San Francisco, 310 U.S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348, 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.' Id., at 255.
>
> ...
>
> Here the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest. 416 U.S. at 155.

In Section A-4 of her Jurisdictional Statement, appellant states that Reed v.

Reed, 404 U.S. 71 (1971) compels a ruling in her favor. She claims that Murgia v. Commonwealth of Massachusetts, 376 F. Supp. 753 (D. Mass. 1974), decided by a three-judge court and pending in this Court, is controlling. Murgia applied the test set out in Reed, but Murgia is distinguishable on its facts. The Court in that case declared "that mandatory retirement of [police] officers at 50 years of age bears no 'fair and substantial relation to the object of the legislation.'" Id., at 754. [Citations omitted.] The Court specifically stated in footnote 9 of their opinion: "Whether we would reach the same result if the statute selected a more customary retirement age is not before us...." Id., at 756. Such a statement indicates that the Court does not

consider 50 years of age a customary age for retirement.

Age 65 is the age for retirement as set out in the Federal Social Security Law, in the Employee Retirement Income Security Act of 1974, specifically 29 U.S.C. Sec. 1002 (24) B(i), in many private retirement systems, and in Louisiana's retirement systems. Since it is used in so many retirement plans, we submit that age 65 is what the Murgia Court envisioned when it used the term "a more customary retirement age." Therefore, we contend, the result of Murgia should not be considered a proper precedent for decision in this case.

Further, courts have found that age 65 mandatory retirement bylaws adopted by an international union are a permissable means of accomplishing a

rational objective, Retail Clerks Union, Local 770 v. Retail Clerks Int. Ass'n., 359 F. Supp. 1285 (C.D. Cal. 1973); that mandatory retirement of senior grade miliary officers is constitutional, Norman v. United States, 392 F. 2d 255 (Ct.Cl. 1968) cert. denied, 393 U.S.1013 (1969); and that a mandatory retirement age of 60 years for police officers is not unreasonable, McIlvanie v. Pennsylvania State Police, 6 Pa. Cmwlth. 505, 296 A. 2d 630 (1972).

In Section A-5 of the Jurisdictional Statement, appellant claims that Louisiana's Retirement System should fall under the rational relationship test. The District Court did not agree. In the Court's opinion (Appendix B, at page 66, of Jurisdictional Statement) they stated:

> This court is satisfied that there is a rational basis for

> maintaining the mandatory retirement requirement at age sixty-five in that it is fairly and substantially related to the state's valid economic objective of maintaining an effecient, vigorous and healthy civil service, and of establishing a feasible system for promotions of younger employees. See Armstrong v. Howell, 371 F. Supp. 48 (D. Neb. 1974), a factually similar case. (Appendix B, at page 66 of Jurisdictional Statement.)

In Armstrong, the Court found "that the mandatory retirement provisions in question achieve[d] a permissible and logical end, and further that the means chosen [were] reasonable and rational." Id., at 53.

Appellant's claim in Section B of her Jurisdictional Statement, that the Statutes and Regulations deny her due process as a public employee in violation of the Fifth and Fourteenth Amendments to the United States Constitution

has found no support in recent court decisions, including that of the Three-Judge Court below in the case at bar.

This Court, through Mr. Justice Stewart, held that an assistant professor was not deprived of "liberty" protected by the due process clause of the Fourteenth Amendment, when he simply was not rehired in the job, but remained as free as before to seek other employment. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). The opinion of the Court below (Appendix B, at page 67 of Jurisdictional Statement) quoted from Roane v. Callisburg Independent School District, 511 F. 2d 633, 638 (5th Cir. 1975) citing Roth:

> To merit due process protections, a person must have more than an 'abstract desire' or even a compelling personal need for the interest in

question; he must be able to establish a 'legitimate claim of entitlement to it.' (408 U.S. at 577)

The Court continued further:

> As the Roth court expressly stated, 'property interests ... are not created by the Constitution, but rather "they are created...and defined by existing rules or understandings that stem from an independent source such as state law..." Board of Regents of State Colleges v. Roth, supra.
>
> (408 U.S. at 577)

The Court also stated:

> Plaintiff has not established that she possessed a constitutionally protected property interest in her employment prior to dismissal; a mere unilateral, subjective expectation that her request for continued employment of one year would receive the requisite final approval (see Plaintiff's Exhibit No. 10) [Affidavit at p. 74-75 of Plaintiff's Brief] is insufficient. See Perry v. Sindermann, 408 U.S. 593, 603 (1972).

The Court found that:

> A review of the record reveal[ed] nothing in plaintiff's employment relationship with the State that would justify or give rise to an objective and bilateral expectation of continued employment. (Appendix B, at page 67 of Jurisdictional Statement.)

Appellant Cannon must show a property interest sufficient to require a hearing, an interest set forth in law.(Also see Robison v. Wichita Falls & North Texas Com. Act. Corp., 507 F. 2d 245 (5th Cir. 1975).) Since in the present case the law specifically negates a property interest, a hearing is not required.

Ms. Cannon enjoyed the benefits of the Louisiana Civil Service Laws. She had no vested right to such employment outside of the security provisions found in state law. She cannot choose the statutes she wishes to affect her. Even

if appellant expected to carry on her duties past age 65 years, that mere subjective "expectancy" is not protected by procedural due process. Perry v. Sindermann, 408 U.S. 593 (1972).

In Section C of her Jurisdictional Statement, appellant states that the Louisiana Mandatory Retirement Statutes and Regulation embody a constitutionally offensive irrebuttable presumption of incompetency.

The appellant has misunderstood and misstated the rationale behind the system's retirement age. In providing for mandatory retirement of civil servants at age 65, the State seeks to provide an incentive for prospective younger employees to make a career as public servants. The requirement of mandatory retirement at age 65 is a condition to

the privilege of being employed by the state, of which the appellant and all employees have knowledge before they enter into an employment contract. Norman v. United States, 392 F. 2d 255, 259 (Ct.Cl. 1968) cert. denied, 393 U.S. 1013 (1969). Birnbaum v. Trussell, 371 F. 2d 672, 677 (2d Cir. 1966); Horton v. Orange County Board of Education, 342 F. Supp. 1244, 1249 (M.D. N.C. 1971). The retirement requirement presumes neither competency nor incompetency.

Appellant suggests that the individualized assessment mandated by Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) is feasible as an alternative to mandatory retirement. Such an assessment is made when an employee seeks a one-year extension beyond

age 65. Appellant's application for such an extension was denied. Since this denial was neither a deprivation of liberty, nor of a property right, as discussed above, there was no procedural due process constitutionally required.

Finally, in Section D of her Jurisdictional Statement appellant alleges that termination after approval of her request for a one-year extension of employment constitutes a breach of contract.

This issue has no place in this litigation. If appellant has a valid claim, she can present this to the Louisiana Civil Service Board for determination. In fact, she has such a claim pending at this time. If she was properly approved for a one-year extension,

the Civil Service Board is her proper source of remedy.

However, we do not concede that the extension was valid. The so-called approval of the extension was initialed by Dr. Brickman within days of his dismissal and nearly two months before plaintiff reached mandatory retirement age. Moreover, by departmental regulation, all applications for extension had to be approved by the Deputy Commissioner of the Louisiana Health and Human Resources Administration. (Affidavit at p. 74-75 of Jurisdictional Statement). The Court below found that appellant Cannon had not established that she had a constitutionally protected property interest in her employment prior to dismissal and the solely unilateral expectation that her request for an extension

of one year would be approved is insufficient.

Alternatively, appellees contend that any attempt at obtaining a money judgment against the State of Louisiana or Charity Hospital is barred by the Eleventh Amendment of the United States Constitution. The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

While the Amendment, by its terms, does not bar suits against a State by its own citizens, this Court has held that states are immune from suits by their own citizens as well as by citizens of another state. Edelman v Jordan, 415 U.S. 651 (1974); Employees v.

Department of Public Health and Welfare, 411 U.S. 279 (1973); Parden v. Terminal Ry., 377 U.S. 184 (1964); Great Northern Life Insurance Co. v. Reed, 322 U.S. 47 (1944); Duhne v. New Jersey, 251 U.S. 311 (1920); Hans v. Louisiana, 134 U.S. 1 (1890).

This Court, on March 24, 1974, in the case of Edelman v. Jordan, 415 U.S. at 663, stated:

> It is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), the Court said:
>
> > [W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. Id., at 464.

> Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. Great Northern Life Insurance Co. v. Read, supra; Kennecott Copper Corp. v. State Tax Comm'n., 327 U.S. 573 (1946). Edelman, supra, at 663.

For the foregoing reasons, it is respectfully urged that the judgment of the District Court should be affirmed.

Respectfully submitted,

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C E R T I F I C A T E

I hereby certify that a copy of the foregoing Motion to Affirm has been served upon counsel for appellant by mailing the same, properly addressed and postage prepaid this 10th day of October, 1975

New Orleans, Louisiana.

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Assistant Attorney General